

# Proportionate Thoughts About Proportionality

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E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES  
IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS  
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## I. PROPORTIONALITY: AN INTRODUCTION

“Proportionality” is the new *lingua franca* of academic writings on constitutional law.<sup>1</sup> But among American lawyers, different specialists think of different meanings of the term, depending on their field. Ask any American criminal law writer or analyst about proportionality, and her first thought will be sentencing, followed by the death penalty, some aspects of substantive criminal law, and, as a possible final afterthought, criminal procedure. An American constitutional scholar might speak of Fourteenth Amendment remedies, injunctions, civil rights’ attorneys’ fees, antitrust violations, and many other areas. Torts lawyers, of course, will focus on punitive damages.

Richard Frase<sup>2</sup> and Thomas Sullivan<sup>3</sup> want to “bring us together” and have all speak the same language, with the same meaning. In this very thoughtful and sweeping book, they argue that Americans should follow the lead of European (and other) jurists who have already adopted the notion of proportionality as a general approach to constitutional adjudication. This, they contend, will result in clearer, more thoughtful, more consistent opinions, which will protect civil liberties and civil rights more aggressively than today’s hodgepodge of constitutional language.

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<sup>1</sup> A survey of titles in the Legal Resources Index showed over 200 articles with either “proportionality” or “disproportionality” in the title between 1/1/2000 and 9/01/2009. This, of course, does not include articles which concerned the idea, but did not include the word in the title, nor does it include books, such as DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* (2004), which is a paean to the concept of proportionality.

<sup>2</sup> Frase is the Benjamin Berger Professor of Criminal Law at the University of Minnesota. Co-editor of the *Federal Sentencing Reporter*, he has been one of the foremost writers on sentencing law in the United States.

<sup>3</sup> Sullivan is currently the Senior Vice President and Provost of the University of Minnesota, and holds the Julius E. Davis Chair in Law. He was the former Dean at the University of Arizona and University of Minnesota law schools.

## II. PROPORTIONALITY IN EUROPE

Proportionality, of course, has ancient roots. From the *lex talionis* of Hammurabi to the songs of Gilbert and Sullivan, history is filled with examples of a basic principle that the penalty should be proportionate to the crime.<sup>4</sup> In Anglo-American jurisprudence, the concept first arises in the Magna Carta: “[a] free man shall not be amerced [penalized] for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it.”<sup>5</sup>

But Frase and Sullivan have much more than merely a criminal context, or even an historic, general concept in mind. Instead, they examine the European concept of “proportionality” and endorse that specific meaning of that term. As they explain it, “proportionality” as employed in Europe has three “senses”: (1) “ends-benefits,” (2) “alternative means,” and (3) “limiting retributive” proportionality principles:

Retributive proportionality strives to ensure a proportional relation between the punishment or award of damages and the actor’s blameworthiness . . . .

. . . .

Ends proportionality usually involves a comparison of a single measure to its expected benefits, whereas means proportionality involves comparison of the costs and burdens imposed by equally effective alternative measures . . . . But assessments of alternative measures can also involve a form of ends proportionality; if one of the measures imposes higher costs or burdens but is also more effective, the question is whether the greater benefits of that measure justify the added costs or burdens it imposes. (Pp. 6–7.)

In contrast to much of current American constitutional adjudication, where the ability of a government action to pass “rational review” or “strict scrutiny” ends the inquiry, under the “proportionality” standard(s) every government measure should be subjected to each of three sub-sets of proportionality review; a failure to meet any one of these tests would invalidate the governmental action.

The test of “proportionality” has been actively used by European (and other) courts for nearly half a century.<sup>6</sup> As Frase and Sullivan demonstrate, it is followed

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<sup>4</sup> WILLIAM IAN MILLER, *EYE FOR AN EYE* (2006), is an exhaustive and somewhat irreverent look at the principle’s history. See also Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 280 (2005) (arguing that the *lex talionis* “is not first and foremost a principle of proportionality”); Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 47 n.46 (1992) (“Proportionality may or may not be a byproduct of the application of *lex talionis*.”).

<sup>5</sup> *Solem v. Helm*, 463 U.S. 277, 284 n.9 (1983) (quoting 1 S.D. Codified Laws, p. 4 (1978)(translation of Magna Carta)).

<sup>6</sup> As one European writer has summarized it:

assiduously in Germany, where it began as an administrative law concept in Prussian law in the late 1800s. (Pp. 28–29.) The concept is found in the Charter of the United Nations, and most continental courts use the standard as well. (Pp. 20–33.) It is today employed in the case law of the European Court of Justice as well as the European Court of Human Rights.<sup>7</sup>

The first chapter examines in some detail both the international law of war and modern European jurisprudence. The authors conclude that the use of the gamut of “sub-tests” of proportionality generates a process more protective of individual rights than that employed by American courts. The authors cite several cases decided by each of the national courts to illustrate the technique used there. But these cases are, perhaps, not as persuasive as they intended. In German cases concerning the right of the state to prohibit marijuana,<sup>8</sup> or reviewing a measure that

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The principle of proportionality is considered to be satisfied if three conditions are met: (1) the act must be appropriate . . . which implies a choice of means tailored to the achievement of the ends (as the idiomatic expression goes: “one has to cut the coat according to the cloth”); (2) the act must be necessary . . . which would not be the case if the ends could be achieved with less restrictive or burdensome means; and (3) the act must be proportionate strictly speaking . . . which means that its costs must remain less than the benefits secured by its ends.

Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L.J. 567, 582 (2003). Zoller cites ERNST FORSTHOFF, *LEHRBUCH DES VERWALTUNGSRECHTS* (9th ed. 1966), and HARTMUT MAURER, *ALLGEMEINES VERWALTUNGSRECHT* (10th ed. 1995), for the history of the doctrine in Germany. *Id.* at 581 n.79. See also NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* (1996); BEATTY, *supra* note 1, *passim* (adding, among other countries adopting “proportionality” as a leading and perhaps the only standard of analysis, Israel, South Africa, Hungary, India, Japan, and Australia). For a comprehensive survey of proportionality in Australian constitutional law, see TONY BLACKSHIELD & GEORGE WILLIAMS, *AUSTRALIAN CONSTITUTIONAL LAW & THEORY* 691–702 (3d ed. 2002). See also D.W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT’L L. 295, 322–23 (1994); T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT’L L. REV. 465, 465–66 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Allen E. Shoenberger, *Messages from Strasbourg: Lessons for American Courts from the Highest Volume Human Rights Court in the World—the European Court of Human Rights*, 27 WHITTIER L. REV. 357 (2005).

<sup>7</sup> Article 49 of the Charter of Fundamental Rights of the European Union expressly declares that “[t]he severity of penalties must not be disproportionate to the criminal offence.” Charter of Fundamental Rights of the European Union, art. 49(3), Dec. 18, 2000, 2000 O.J. (364), available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf). (Note that the Charter does not use the adjective “gross,” although many European—and other—courts have employed such a restraining adjective.) Some argue that the UK has also embraced the idea, but that is a bit more problematic. See Richard Clayton, *Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle*, 5 EUR. HUM. RTS. L. REV. 504 (2001).

<sup>8</sup> Cannabis Case, Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] 1994, 90 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 145 (F.R.G.), reprinted in GLOBAL CONSTITUTIONALISM: PRIVACY, PROPORTIONALITY, THE POLITICAL CASE, IV-3, IV-5 to -6 (Paul Gewirtz & Jacob Katz Cogan eds. 2001) [hereinafter GLOBAL].

restricted horseback riding to specially designated trails,<sup>9</sup> the courts did in fact measure the governmental action against the “ends” and “means” tests, but in both cases upheld the legislation. It is unlikely that an American court would find differently. But their general point—that European courts use the proportionality analysis to scrutinize more closely government activity—cannot be gainsaid. As one commentator has said of the *Cannabis Case*:

[I]t is very doubtful that the U.S. Supreme Court would undertake anything comparable to the German Constitutional Court’s detailed proportionality analysis to questions of drug possession in the Cannabis case [challenging any criminalization of marijuana] . . . whether under the due process clause or the Eight [sic] Amendment. Under the due process clause, the Court would most likely treat the questions under the “rational relation” standard, and rather quickly reject a constitutional challenge, even regarding the use of the criminal sanction for occasional drug use.<sup>10</sup>

Frase and Sullivan also point to the adoption of the proportionality rule in Canada, in the landmark case of *R v. Oakes*,<sup>11</sup> but conclude that the Canadian Supreme Court “has not invalidated a provision solely for failure to balance the costs and benefits of its implementation if it satisfied the first two criteria of proportionality.”<sup>12</sup> (P. 28.)

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<sup>9</sup> The “riding regulation” was a part of the North Rhine Westphalia (state) regulatory regime of the Countryside Act of June 26, 1980. It actually involved keeping horses on one “track” and walkers and cyclists on another. *Reiten im Walde Case*, Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] 1989, 80 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 137 (F.R.G.), reprinted in GLOBAL, *supra* note 8, at IV-14, IV-16.

<sup>10</sup> GLOBAL, *supra* note 8, at IV-62 (citations omitted). Another example, *Ministre du développement industriel et scientifique c Arnaud*, is cited by EMILIOU, *supra* note 6, at 111. This was an environmental case in which the government was required by the court to balance the ecological benefit gained by closing a polluting plant against the social and economic damage that would follow from the closure.

<sup>11</sup> [1986], 1 S.C.R. 103.

<sup>12</sup> Other scholars are divided on the impact of Canadian cases. See Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 804–05 (2004) [hereinafter Jackson I] (reviewing BEATTY, *supra* note 1) (“Canada has played a particularly influential role in the transnational development of proportionality testing in constitutional law. . . . The means-ends proportionality analysis has been further elaborated in Canadian caselaw, caselaw that is widely cited by constitutional courts around the world.”). Zoller appears to agree with Jackson, noting that the key Canadian case of *Oakes* “has taken on some of the character of holy writ” as wittily described in a recent treatise. Zoller, *supra* note 6, at 568 n.18 (quoting PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 35.8(b), at 878 (4<sup>th</sup> ed. 1997)). On the other hand, David Beatty, who taught at the University of Toronto Law School for many years and is a recognized scholar of the Canadian Constitution, is less sympathetic to the Canadian Supreme Court’s application of the doctrine: “The position of the Canadian judges is completely at odds with mainstream opinion in the rest of the world and makes no logical or practical sense.” BEATTY, *supra* note 1, at 164.

Having nicely, if somewhat quickly, reviewed international use of the test, Frase and Sullivan turn to the real point of the book—to persuade us that American courts should adopt the approach.

Writers disagree about the historic uses of the term “proportionality” in American courts. Stephen Parr comments:

After Reconstruction, the Supreme Court gradually developed a federal cruel and unusual punishment jurisprudence, which centered around the evolving and ill-defined concept of proportionality. Initially . . . the Court refused to recognize such a concept. In *O'Neil v. Vermont*, however, a minority of justices accepted the proportionality argument. Finally, in *Weems v. United States*, a majority of the Justices explicitly recognized a proportionality guarantee.<sup>13</sup>

Sheila Scheuerman traces the “grossly excessive” standard to early cases in the 1900s:

The excessiveness standard originated in a series of *Lochner*-era cases addressing statutory damages. Building on these cases, the Court elaborated on the meaning of excessiveness in the punitive damages context. In an ironic twist, although the punitive damages excessiveness standards derived from the earlier statutory damages jurisprudence, courts generally have found the punitive damages framework inapplicable to statutory damages, and return instead to the *Lochner*-era caselaw.<sup>14</sup>

### III. PROPORTIONALITY IN THE COMMON LAW

Frase and Sullivan proceed to discuss, in chapters 2, 3, and 4, proportionality in the common law (both English and American) of damages, and then “implicit” and “explicit” proportionality principles in American law, respectively. The thrust of each of these chapters is to demonstrate: (1) that American courts have used disparate,<sup>15</sup> and often outcome determinative labels in adjudicating a wide range of subjects, including land use permit conditions, antitrust disputes, and remedies cases (including congressional authority to enact legislation pursuant to Section 5 of the Fourteenth Amendment); and (2) that all of these labels have some aspects

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<sup>13</sup> Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 66 (2000) (footnotes omitted).

<sup>14</sup> Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 116 (2009) (footnotes omitted).

<sup>15</sup> See, e.g., Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165 (1985) (speaking of a number of doctrinal rules “expressed in elaborately layered sets of ‘tests’ or ‘prongs’ or ‘requirements’ or ‘standards’ or ‘hurdles.’”).

of the “ends” or “means” proportionality approach which Frase and Sullivan (and European courts and scholars) espouse. (The terms “akin” or “implicit” or “similar to” pervade these chapters).

The most familiar of these areas for most readers will be the United States Supreme Court’s chaotic approach to constitutional issues. Rehearsing a raft of terms (“strict scrutiny,” “intermediate scrutiny,” “rational basis,” “compelling state interest,” “balancing,” “least drastic alternative,” and a host of other approaches) that the Court has used, almost willy-nilly,<sup>16</sup> the authors have two major points. First, the use of a consistent standard might bring both clarity and transparency to the adjudication project. Rather than simply declaring that a specific government action should be judged by “rational basis” (in which case the government will almost surely win) or “strict scrutiny” (in which case the government will almost surely lose), Frase and Sullivan urge a court to apply the “ends” and “means” proportionality approach to every government regulation, asking first whether the ends sought is likely to be achieved by the regulation and if so, by asking second whether the means chosen to achieve that end intrude too much on any individual freedom (including, among others, freedom of contract, freedom to engage in business, as well as free speech, religion, etc.). Applying these standards across the board, they urge, would more assuredly protect civil liberties and limit unnecessary (disproportionate) government invasion of those rights. This part of the analysis is geared to show that the courts—and especially *the* Court—have not directly or fully embraced any version of proportionality, but instead have decided cases on what appears to be an ad-hoc, outcome determinative set of platitudes.

Second, even while chastising American courts for not adopting the European proportionality template, Frase and Sullivan wish to assure us that that template is not so “foreign” or “alien” to American courts as to require an entire new mind set. Throughout their analysis in these chapters, the authors declare that courts have employed techniques “akin” to their “ends” or “means” approach (or both) or that concepts of proportionality are “implicit” in the Court’s (and courts’) analyses. Their point is that, like Moliere’s character who learns that he has been speaking prose all his life,<sup>17</sup> the courts have similarly been employing versions—albeit diluted and undirected and even unappreciated versions—of “ends” and “means”

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<sup>16</sup> GLOBAL, *supra* note 8, at IV-61 to -62:

In the “due process” and “equal protection” areas, therefore, the formal doctrinal structure is basically a two-tiered one, with some use of an intermediate third-tier in circumscribed circumstances.

In fact, however, . . . [i]t appears that the Court has used “rational relation” review (and to a lesser extent, “strict scrutiny” review as well) in a rather more flexible way than the formal doctrinal structure suggests. Thus, although “rational relation” review typically gives great deference to legislatures, there have been a variety of cases in which it has been used less deferentially, suggesting that in fact a more demanding test was being used.

<sup>17</sup> RICHARD WILBUR MOLIERE, *THE BOURGEOIS GENTLEMAN*, act 2, sc. 4 (Bernard Sahlins trans., Ivan R. Dee 2000) (1670) (“Jourdain: ‘My God! I’ve been speaking prose for over forty years and didn’t even know it. I’m in your debt for telling me this.’”).

proportionality. Although some of this discussion sounds like the hammer-nail cliché, there is an almost irresistible appeal to the idea that by applying one standard (or set of sub-standards) clarity could arise from opacity.

#### IV. PUNITIVE DAMAGES: A CONTRAST AND A WARNING (???)

Other areas of the Court's decisions may make one wary of the apparent appeal of proportionality as a doctrine. The flawed experiment in punitive damages (which may already be effectively terminated) illustrates the concern. The book covers the Court's rapid turnabout from its declaration, only twenty years ago, that the Eighth Amendment had little or nothing to do with punitive damages to a decision in 2003 that appeared to adopt a very specific constitutionally based due process approach to limiting punitives.<sup>18</sup> While readers of this journal may be familiar with that line of cases, or may be more interested in the book's take on criminal law—in particular sentencing and the death penalty—the punitive damage story is worth rehearsing, however briefly, both because it is fascinating in its own right, and because it stands in stark contrast to the Court's decisions in noncapital sentencing cases.

In 1989, in *Browning-Ferris Indus. of Vermont v. Kelco Disposal*, the Court held that the Excessive Fines Clause of the Eighth Amendment did not apply to punitive damages.<sup>19</sup> Two years later, however, in *Pacific Mutual Life Ins. v. Haslip*, it upheld an award of punitive damages but appeared to recognize a due process cap on punitives.<sup>20</sup> Two years after that, in *TXO Production Corp. v. Alliance Resources Corp.*, it seemed to grant presumptive constitutional validity to any award of punitives.<sup>21</sup> A scarce three years later the pace accelerated and took a stunning turn. In *BMW v. Gore*,<sup>22</sup> the Court struck down, as unconstitutional, a punitive award as "excessive" and suggested that punitives could not carry a ratio of more than 10:1 to compensatories, a view it reinforced in *State Farm v. Campbell*.<sup>23</sup> These latter two cases established "guideposts" for assessing punitive damages: (1) reprehensibility of the defendant's conduct; (2) the actual or potential harm inflicted on these plaintiffs; and (3) comparison between the amount of punitives awarded and other penalties—civil and criminal—which the state might impose.

The decisions in *BMW* and *State Farm* also severely limited the kind of evidence which plaintiffs could adduce to obtain exemplary damages. Most importantly (for purposes to be discussed below), the Court held that juries could

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<sup>18</sup> See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>19</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280 (1989).

<sup>20</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22–24 (1991).

<sup>21</sup> *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465–66 (1993).

<sup>22</sup> *BMW of N. Am. v. Gore*, 517 U.S. 559, 581, 585–86 (1996).

<sup>23</sup> See *Campbell*, 538 U.S. 408, 425 (2003).

not award punitives based upon: (1) harm done to non-plaintiffs who might be bringing their own suits; (2) non-similar harms done to the plaintiffs in the case; or (3) harms done outside the jurisdiction. These limitations on inter- and intra-jurisdictional facts are, as we shall see, not unlike those in criminal sentencing cases.

Unfortunately for Frase and Sullivan, their manuscript apparently was completed before the Court's most recent—and radical—decision in the area. In *Exxon Shipping Co. v. Baker*, the Court, applying “federal maritime law,” held that a ratio of 1:1 was compelled by fairness.<sup>24</sup> The decision came in an extraordinarily unique and unfortunate setting: the widespread environmental damage that occurred when the *Exxon Valdez* split open in 1989 in Alaska's Prince William Sound, causing irreparable harm to the environment. The facts of *Exxon* were also extreme: to Exxon's knowledge, the captain, Joseph Hazelwood, had been an alcoholic for many years, and the location was one of the more difficult areas in which to navigate.<sup>25</sup> Nevertheless, Hazelwood abandoned the deck and left the navigation of the strait to a well-trained, but still relatively new, helmsman. The jury, after instructions which clearly complied with *Gore-State Farm*, and which were narrowly constructed, nevertheless returned compensatory damages of \$500 million, and punitives of \$5 billion (a ratio of 10:1). The Ninth Circuit, hardly a friend of big business, reduced the punitive award by fifty percent, to \$2.5 billion (a 5:1 ratio). The Supreme Court then reduced that award to \$500 million, holding that federal maritime law required a maximum of a 1:1 cap on punitive-compensatory awards.

The *Exxon* Court took pains to say that it was not deciding the case on a constitutional, but only on a common law (federal maritime), basis. But it relied heavily on statutory caps on punitive damages used in the states, as well as practices in other countries, comparisons which stood in marked contradiction to the evidence that *BMW* and *State Farm* allowed plaintiffs to introduce. Moreover, in its ultimate footnote, the Court, per Justice Souter, declared:

The criterion of “substantial” takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit, a concern addressed by the opportunity for a class action when large numbers of potential plaintiffs are involved: in such cases, individual awards are not the touchstone, for it is the class option that facilitates suit, and a class recovery of \$500 million is

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<sup>24</sup> 128 S. Ct. 2605, 2634 (2008).

<sup>25</sup> Hazelwood, the master of the vessel and a relapsed alcoholic, had spent the day at waterfront bars drinking. *Id.* at 2612. Witnesses testified that before the ship left port he had consumed at least five double vodkas (approximately fifteen ounces of 80-proof alcohol), “enough that a non-alcoholic would have passed out.” *Id.* Nonetheless he faced night voyage through the “treacherous waters of Prince William Sound.” *Id.* at 2638. Given Hazelwood's blood alcohol level several hours after the accident, experts testified that his blood alcohol level must have stood at about .241 at the time of the accident. *Id.* at 2613.



substantial. In this case, then, the constitutional outer limit may well be 1:1.<sup>26</sup>

This caution, however, has even now divided the courts.<sup>27</sup>

It is easy to argue that the Supreme Court is more concerned with money than it is with freedom—that it imposes extraordinary limits on what a jury may award in damages, because that leaves juries (and judges in indeterminate sentencing jurisdictions) “unfettered” freedom to punish criminal defendants.<sup>28</sup> I will turn to criminal sentencing in due course. But another analysis of *Exxon* and the Court’s

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<sup>26</sup> *Exxon*, 128 S. Ct. at 2634 n.28.

<sup>27</sup> The lower courts have been divided over whether *Exxon* is limited to federal maritime law. Most courts hold that it is so limited. See, e.g., *KYD, Inc. v. United States*, 613 F. Supp. 2d 1371, 1381 (Ct. Int’l Trade 2009); *Merrick v. Paul Revere Life Ins. Co.*, 594 F. Supp. 2d 1168, 1192 (D. Nev. 2008) (reduced to a 9:1 ratio); *Am. Family Mut. Ins. Co. v. Miell*, 569 F. Supp. 2d 841, 859 (N.D. Iowa 2008); *Line v. Ventura*, 38 So. 3d 1, 13 (Ala. 2009). Two courts have held that *Exxon* does not apply to cases brought under 42 U.S.C. § 1983 to vindicate constitutional rights. See *Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429, 484 (W.D. Pa. 2008); *Valarie v. Mich. Dep’t. of Corr.*, 2008 WL 4939951, at \*1 (W.D. Mich. 2008). To the contrary is a decision by the Third Circuit. See *Jurinko v. Med. Protective Co.* 305 F.App’x. 13, 30 (3d. Cir. 2008). The Court has denied certiorari in at least one case holding that *Exxon* is limited to maritime cases and does not establish a constitutional common law ratio. See *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d. 521, 539 (Tenn. 2008) (5.35:1 ratio), cert. denied, *DaimlerChrysler Corp. v. Flax*, 129 S.Ct. 2433, 2433 (2009). See also Rebecca Porter, *Third Circuit Establishes One-to-One Ratio for Punitive Damages*, TRIAL, March 2009, at 20 (for a brief comment on and summary of *Jurinko*). For commentary on the *Exxon* case, see Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 ALASKA L. REV. 1 (2009); Brandon T. Morris, *Oil, Money, and the Environment: Punitive Damages Under Due Process, Preemption, and Maritime Law in the Wake of the EXXON VALDEZ Litigation*, 33 TUL. MAR. L.J. 165 (2008); Scheuerman, *supra* note 14; Lester Sotsky & Daniel J. Stuart, *Punitives Post-Exxon?*, NAT’L L.J., Sept. 29, 2008, at 12.

<sup>28</sup> See, e.g., Pamela S. Karlan, “Pricking the Lines”: *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 920 (2004) (“Having embraced and then largely abandoned a judicially enforceable constitutional requirement of proportionality under the Eighth Amendment in criminal cases, the Court has articulated an increasingly robust requirement of proportionality under the Due Process Clause in punitive damages cases.”). Tracy A. Thomas, *Proportionality and the Supreme Court’s Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 118–19 (2007) (footnotes omitted), agrees:

While the rest of the world uses proportionality to protect plaintiffs, the Supreme Court uses proportionality to insulate defendants. On the international level, the norm of proportionality is generally used to protect plaintiffs against governmental intrusion. Proportionality is used as a mechanism of judicial review to prevent exercises of excessive legislative and executive power that infringe on individual rights. Conversely, the remedial proportionality principle of the Supreme Court is used to curtail excessive judicial intrusions into the interests of government and corporate defendants.

See also Ristroph, *supra* note 4, at 297 (“There does not seem to be much doubt that when money is at stake, proportionality matters.”); Rachel A. Van Cleave, *Mapping Proportionality Review: Still a “Road to Nowhere”*, 43 TULSA L. REV. 709, 709 (2008) (footnote omitted) (“[T]here is a constitutional sound-wall between the two distinct roads it had previously paved for proportionality review of terms of imprisonment and of civil punitive damages for possible excessiveness.”).

forays into punitive damages is possible:<sup>29</sup> that the Court wants legislatures to declare caps on punitive damages, at which point such legislative decisions will be upheld as “not disproportionate.”<sup>30</sup>

Fisher argues that the “real” problem in *Exxon* was not the excessiveness of the award per se, but rather the fact that there was no “notice” that the award might be that large:

If the problem with the modern system of awarding punitive damages is a substantive one, then the Court's holdings mean that the Due Process Clause in any given case flatly forbids a jury from imposing punitive damages above a given level—apparently some low—level multiple of the underlying compensatory damages—no matter how much notice the defendant received that a bigger award was possible or how fair the trial was. But if the problem with the modern system of awarding punitive damages is essentially a procedural one, then the Court's holdings mean that legislatures and courts could allow punitive damages far in excess of low-single-digit ratios so long as the governing law provides fair notice, the court gives clear jury instructions, and related rules of fair play are followed.<sup>31</sup>

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<sup>29</sup> See Fisher, *supra* note 27, at 9 (footnotes omitted):

Twenty-one states—mainly in recent times—have established monetary caps on punitive damages or limits on the ratio a punitive award may bear to compensatory damages. Numerous federal statutory causes of action that allow for punitive damages limit them in a like manner. But the majority of states still impose no limit at all . . . .

<sup>30</sup> See Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 154 (2008) (arguing vehemently that the Court wants legislatures, and not courts, to set limits, as it has done in criminal cases). See also Fisher, *supra* note 27, at 25, 41:

[T]his deference should be even more pronounced when legislative determinations respecting punitive damages supply frameworks for jury verdicts.

. . . . [I]t is one thing to say that such a ratio should be a default rule—that is, the presumptive limit in the absence of legislation covering the conduct at issue. It would be wholly another thing to enforce such a one-to-one principle in the face of a considered legislative judgment to the contrary. . . . Such judicial action would summon distinct and uncomfortable echoes of *Lochner's* era of “economic substantive due process.”

The *Exxon* Court explicitly noted that the jury had not been asked whether Exxon's conduct was “any degree of fault beyond the range of reckless conduct.” *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2614 n.2 (2008). If, as suggested above, these cases are equivalent to “repeat offenders,” the Court may have left the door open (as it has in criminal sentencing) to legislative decisions that in those cases, “the sky is the limit.”

<sup>31</sup> Fisher, *supra* note 27, at 3. This “notice” argument strikes me as implausible; it incorporates the fiction that defendants read statutes but are not familiar with the common law. Corporate defendants, moreover, are likely to be “advised” by their lawyers of the indeterminate nature of the potential damages. As Professor Anthony G. Amsterdam's famous note demonstrated so long ago, with the “void for vagueness” rules of criminal law, the rules operate as a method by which courts can rein in the otherwise total discretion of police to arrest (or harass) unfavored

Establishing constitutional limits on punitive (and possibly even compensatory) damages evidences a mistrust of the jury. Allowing remittitur under common law concepts manifested this problem. This tension is patent in *Exxon* itself.<sup>32</sup> The jury in *Exxon* was told, for instance, that it could consider: (1) whether corporate policy contributed to, or actually prescribed, the wrongdoing; (2) whether corporate policy makers and people with significant duties and responsibilities, or just low-level employees, participated in the wrongdoing; (3) whether several employees or just a limited number played roles in the misconduct; (4) whether Exxon had taken steps to prevent recurrence of the wrongdoing; (5) whether criminal and civil fines Exxon had already paid, coupled with its clean-up costs, mitigated the need for any award that otherwise would be proper; (6) whether the social condemnation Exxon had suffered mitigated the need for any punitive award; and (7) whether a punitive award might be borne by Exxon shareholders.<sup>33</sup> If these highly restrictive (and restricting) instructions were insufficiently limiting upon the jury's discretion, then it is likely that *Exxon* will lead to a constitutional-common law cap on punitives in all cases.

## V. PROPORTIONALITY AND THE CRIMINAL PROCESS

The decisions on punitive damages both replicate, on one hand, and stand in stark contrast, on the other, to the Supreme Court's criminal decisions. In Chapter 5, Frase and Sullivan review criminal procedure decisions, particularly Fourth Amendment cases, where they argue that "reasonableness" is far too lax and flexible a standard, but that "ends- and means-proportionality principles" are "implicit" in many of those opinions. (P. 97.) They note that many scholars<sup>34</sup>

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defendants. Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 88 (1960).

<sup>32</sup> But see Karlan, *supra* note 28, at 882–83 (arguing that the Supreme Court gives less deference to juries in punitive damage awards because criminal punishments are institutionally limited by the role of the executive in a criminal proceeding).

<sup>33</sup> See Neil Vidmar & Matthew W. Wolfe, *Fairness Through Guidance: Jury Instruction on Punitive Damages After Philip Morris v. Williams*, 2 CHARLESTON L. REV. 307, 318–24 (2008). But see Romero, *supra* note 30, at 156 (arguing that jury instructions are inadequate without legislative cap).

<sup>34</sup> The authors cite *inter alia*, Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1098, 1120–23 (1998); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436–37 (1974); Sherry F. Colb, *The Qualitative Dimensions of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1724–25 (1998); Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998) [hereinafter *Proportionality Principle*]; Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 51–55 (1991). Timothy O'Neill makes similar Fourth Amendment arguments without specifically using the "proportionality" concept. Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 719–24 (1998).

Innumerable articles consider proportionality and criminal justice. See, e.g., Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for*

have argued for some kind of proportionality principle (p. 98.), but that the Court has failed to take that path, choosing instead to “balance” a number of factors<sup>35</sup>—too many factors to provide a clear and coherent analytic framework:

[P]roportionality analysis . . . would clarify the essential ends-benefits tradeoffs and might also encourage courts . . . to apply alternative-means analysis more frequently. . . .

. . . [P]roportionality concepts . . . lend themselves more readily to the actual task courts face in these cases—setting appropriate and meaningful limits on excessive government measures . . . .

[P]roportionality principles are better suited to the process of judicial review than is a balancing metaphor since the latter suggests a specific, optimum solution . . . . [T]he question is . . . whether the measures used were so severe, relative to their purposes and/or to alternative means, that a court should find the search or seizure to be unreasonable. (P. 99.)

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*Uniformity*, 107 MICH. L. REV. 1145, 1155–62, 1178–82 (2009); Henry F. Fradella, *Mixed Signals and Muddled Waters: Making Sense of the Proportionality Principle and the Eighth Amendment*, 42 CRIM. L. BULL. 498 (2006); Adam M. Gershowitz, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000); James Headley, *Proportionality Between Crimes, Offenses, and Punishments*, 17 ST. THOMAS L. REV. 247 (2004); Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1203 (2000); Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461 (2000); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 699 n.102 (2005); Carol S. Steiker, Panetti v. Quarterman: *Is There a “Rational Understanding” of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 290–95 (2007); Peter P. Swire, *Proportionality for High-Tech Searches*, 6 OHIO ST. J. CRIM. L. 751 (2009); Malcolm Thorburn & Allan Manson, *Review Essay: The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning*, 10 NEW CRIM. L. REV. 278 (2007) (reviewing ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (2005)); Rachel A. Van Cleave, *“Death Is Different,” Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 272–78 (2003).

<sup>35</sup> As Frase and Sullivan note on p. 204, note 1, Justice Marshall on several occasions urged a sliding scale approach to constitutional adjudication, which would mirror proportionality review. They cite *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting). See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting). But see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992) (“[T]he Court ties itself to the twin masts of strict scrutiny and rationality review in order to resist (or appear to resist) the siren song of the sliding scale. . . . [T]wo-tier review generally decides cases through characterization at the outset, without the need for messy explicit balancing.”).

Even in its more recent opinions, such as *Arizona v. Gant*, 129 S. Ct. 1710 (2009), the Court has focused on the term “reasonable” rather than use the word “proportionate,” while assessing a search for excessiveness and necessity. Even if this is somewhat required by the actual words of the Fourth Amendment, if the Court were moving in the direction of “proportionality,” it could easily use the Frase and Sullivan taxonomy rather than reasonability.

Even more complex has been the Court's struggle to distinguish "civil" from "criminal" measures, where the Court has focused on the (unspoken) "intent" of the legislature. In discussing these cases, Frase and Sullivan declare "[P]roportionality is not sought in its own right but instead serves an evidentiary function . . . . The notion of excessiveness applied in these cases seems to be a means proportionality concept by asking whether the measure is unnecessarily broad or unreasonably intrusive in light of its supposed nonpunitive purpose." (P. 109.) On the other hand, substantive criminal law, discussed in Chapter 6, has explicitly used a proportionality standard in a number of different areas, most notably with the defense of self-defense, where the force used must be "proportionate" to the force threatened. Frase and Sullivan argue that this requirement "favors the government," (p. 125) but that is certainly arguable. Under current doctrine there is no requirement of actual proportionality as long as the slayer *reasonably believes* the force is necessary. The fact that it turns out *not* to be proportionate to the force actually used by the victim does not preclude the self-defense claim.

The critical point here, however, is that throughout the discussion of substantive criminal law, the authors adhere more to the "limiting retributivism" theme than to either of the other prongs of proportionality analysis ("ends" and "means" proportionality). This implies, surely, that substantive criminal law doctrines limit the punishment imposed to some relationship to the culpability of the offender.<sup>36</sup> This has many implications for the "final showdown" arena—criminal sentencing.

## VI. PUNISHMENT

Readers of this journal will probably be most interested in what the book has to say about proportionality in punishment. It is, after all, the essence of criminal law, and has been the topic of debate for the millennium. As is all too painfully evident, the Court's meanderings with both the death penalty and noncapital sentencing have been, to be kind, not illuminating. The remainder of the book—nearly one-third of it—is devoted to this area.

### A. Death Penalty

Since *Furman v. Georgia*<sup>37</sup> and *Gregg v. Georgia*<sup>38</sup>, the Supreme Court has famously held the death penalty unconstitutional in two ways: (1) for specific crimes;<sup>39</sup> and (2) for specific groups of offenders.<sup>40</sup> Frase and Sullivan spend only

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<sup>36</sup> See Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 141 (2009).

<sup>37</sup> 408 U.S. 238 (1972).

<sup>38</sup> 428 U.S. 153 (1976).

<sup>39</sup> See, e.g., *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008) (rape of a child); *Coker v. Georgia*, 433 U.S. 584 (1977) (rape of an adult).

slightly more than two pages on these decisions, declaring that the Eighth Amendment prohibits “excessive” punishments that (1) make no measurable contribution to acceptable goals of punishment (“ends” proportionality); or (2) are grossly out of proportion (proportion *stricto sensu*).<sup>41</sup> (P. 131.) The first standard, they contend,

would . . . be thought of [in Europe] as a question of proportionality . . . .  
. . . [It] could [also] implicitly incorporate means-and/or ends-proportionality concepts. The means-proportionality argument is that the death penalty is unnecessary and therefore excessive . . . . In each of these cases, although the Court expressed doubt that the specified group of offenders was at all deterred by the threat of capital punishment, it did not assert that there was no deterrent effect . . . . [I]ts decisions could be justified by a means-proportionality argument—the minimal deterrence these offenders would experience from the threat of receiving the death penalty is no greater than that provided by the threat of a lesser penalty . . . .

....

. . . The ends-proportionality version . . . would be that the death penalty . . . is excessive relative to its meager deterrent benefits. But . . . the real ends-benefits issue is whether the *added* deterrent benefits of execution, compared to life imprisonment, justify the added severity. (P. 131–32.)

It may be, as the authors contend, that adoption of the two instrumentalist tests (“ends” and “means”) would provide a “more precise” analysis than the Court has thus far rendered. But the book never discusses what the Court has, on most of these occasions, found to be the keys to the Eighth Amendment: the “evolving standards of decency” language from *Trop v. Dulles*.<sup>42</sup> Twenty-five years ago, Joshua Dressler cogently argued that “personhood” is at the core of a proportionality concept,<sup>43</sup> a view echoed by many.<sup>44</sup> The argument goes back as

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<sup>40</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (mentally retarded persons); *Enmund v. Florida*, 458 U.S. 782 (1982) (non-participating accomplice).

<sup>41</sup> The Court in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), used the term “proportionate” sparingly, and never with the adjective “gross” (except as it was used in cases which the Court cited and quoted). This may be totally irrelevant, or it might point to a new assessment in noncapital cases.

<sup>42</sup> 356 U.S. 86, 101 (1958).

<sup>43</sup> Joshua Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 Sw. L.J. 1063, *passim* (1981). See also Markûs Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 515 (2004):

The dignity that is protected by the Eighth Amendment, the Due Process Clause, and American constitutions, federal and state, is not social dignity, but human dignity, a property shared by all persons as such. It is not a dignity that is bestowed upon persons, either by other persons or by “the state” or “society” or some community or other, and

far as Beccaria,<sup>45</sup> upon whose shoulders Frase and Sullivan place much of the credit for utilitarian analysis of punishment. But, for Beccaria, human dignity, individual freedom, and utilitarianism are not mutually exclusive. He says that if he can demonstrate that the death penalty is “neither useful nor necessary,” he will “have gained the cause of humanity.”<sup>46</sup>

This concern with human dignity is even more to the point after the Supreme Court’s decision in *Kennedy v. Louisiana*, invalidating the death penalty for the crime of raping a child.<sup>47</sup> This opinion, rendered after the manuscript of the Frase and Sullivan book was submitted, focused (as have many of the death-penalty-invalidating decisions) on the “objective indicia of society’s standards, as expressed in legislative enactments and state practice,” and found a “national consensus” *not* that the death penalty would not deter, nor that child rapists were *not* dangerous, but rather that the penalty simply was disproportionate *stricto sensu*. In short, there was a national consensus (which was either developing or had already developed) that executing even the most heinous criminals when they had not themselves taken life was inhumane.<sup>48</sup> The Court’s refuge to what it found to be a movement among state legislatures to preclude the death penalty for child rape reflected a concern for inter-jurisdictional assessment mandated by the *Trop* test. The book’s near-omission of the *Trop* test—and *Trop*’s focus on “personhood” and “human decency”—may be emblematic of a larger point.<sup>49</sup>

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that therefore can be taken away. It is a dignity that exists entirely independently of political and social institutions; it is a moral, as opposed to an ethical or political, property.

The Constitutional Court of Germany has called human dignity “the supreme value enshrined in the Basic Law.” Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] 1973, 35 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 202 (F.R.G.), *reprinted* in GLOBAL, *supra* note 8, at IV-1.

<sup>44</sup> See, e.g., Ristroph, *supra* note 4, at 273–75 (citing, in particular, Beccaria’s fear that no punishment turn into torture, which he viewed with “horror and disgust”).

<sup>45</sup> CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (W.C. Little & Co. 1872) (1793).

<sup>46</sup> *Id.* at 98. I emphasize Beccaria’s concerns for individual freedom and human dignity here only to show that his objections to excessive punishments are not strictly deterrence-based.

<sup>47</sup> 128 S. Ct. 2641 (2008).

<sup>48</sup> *Id.* at 2650, 2653.

<sup>49</sup> Frase and Sullivan do not cite, nor discuss, *Pulley v. Harris*, 465 U.S. 37, 50–51 (1984), where the Court held that the Eighth Amendment did not require “proportionality review” of capital sentences. In one sense, it is perfectly understandable—although the term used was “proportionality” review, defendant was actually asking for “comparative” review—for the Court not to require the state to “compare” the severity of his crime with that of others who either (a) were not charged with capital homicide or (b) were convicted of capital homicide but were not actually sentenced to death. This would entail a review not only of the facts of every case of every person actually sentenced to death, but also a comparison of those facts to the acts of every killer (a) not charged with capital homicide; (b) not convicted of capital homicide; and (c) not sentenced by a jury to capital punishment. While many states had adopted the extra layer of “proportionality review,” this might be seen as an extraordinary administrative burden to place upon states that did not see fit to

Because the authors' version of "proportionality" is driven by utilitarian, rather than normative, goals, the Kantian "categorical imperative" gets little attention here. Dignity and personhood, after all, are not primary utilitarian concerns.<sup>50</sup> Frase and Sullivan seek to persuade us that the two utilitarian parts of the European proportionality analysis (ends-benefits and means-proportionality) are the primary tests for assessing punishment. But given the Court's obvious focus on dignity and decency, particularly in the cases prohibiting death for certain classes of persons not deemed fully culpable, their omission of the "personhood" approach is disconcerting.

The death penalty cases are also important for another reason: in framing what the "evolving standards" are, the Court has resorted in almost every instance to a comparative basis, determining whether other states use the death penalty for this crime or for this kind of offender. That methodology was also used in the punitive damages cases, in particular *Exxon*. These two groups of cases stand in direct contrast to the noncapital sentencing cases, discussed below, where the Court has given lip service to the *possibility* of comparative analysis but effectively precluded it. In punitive damages, this methodology protects the civil defendant; in sentencing cases, it protects federalism, which indirectly protects the state. In both instances, the individual tends to lose.

### B. The Test Case: Noncapital Sentencing

Perhaps in no area has the Court used the term "(dis)proportionate" more, and to less avail, than in noncapital sentencing. In the famous "six cases,"<sup>51</sup> it has moved from a view that sentences which are "grossly"<sup>52</sup> disproportionate

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adopt it. The *Pulley* Court held, 7-2, that the absence of a provision for proportionality review did not violate the Eighth Amendment. *Id.* Still, Frase and Sullivan's failure to even cite this case is a bit perplexing. For discussion, see David S. Baime, *Comparative Proportionality Review: The New Jersey Experience*, 39 CRIM. L. BULL. 227, 228-29 (2003); Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1166-70 (2001); Lawrence S. Lustberg & Lenora M. Lapidus, *The Importance of Saving the Universe: Keeping Proportionality Review Meaningful*, 26 SETON HALL L. REV. 1423, 1440 (1996).

<sup>50</sup> To paraphrase Robert Frost: let no reader misunderstand me—I am not in any way suggesting that Frase and Sullivan, as individuals, do not care about human dignity. *Limited* retributivism (of which more in a moment) implicitly adopts dignity and personhood as constraints upon state power. But that is not that philosophy's focus, whereas it is *the* concern of *defined* retributivism.

<sup>51</sup> *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Solem v. Helm*, 463 U.S. 277 (1983); *Hutto v. Davis*, 454 U.S. 370 (1982); *Rummel v. Estelle*, 445 U.S. 263 (1980).

<sup>52</sup> It is not clear that the word "gross" adds much to the discussion, although it does seem to make "slight" disproportionality acceptable. Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MOD. L. REV. 541, 541-42 (2004) observe that, while in various jurisdictions around the world, it is a constitutional principle that no person should be subjected to a "grossly" disproportionate sentence, the European Union Charter of Fundamental Rights instead declares, in Article II 49(3) that "the severity of penalties must not be



(compared primarily to a defendant's crime) are invalid, to the view that any statutorily approved sentence which can meet *any* penological goal (utilitarian or normative, whether articulated by the legislature or not) will be sustained.<sup>53</sup> After the *Ewing-Andrade* duad, in which the Court upheld sentences of twenty-five and fifty years respectively upon repeat offenders, whose most recent crimes involved the potential loss of no more than \$1200 and \$150 respectively,<sup>54</sup> most commentators declared that proportionality (by which they mean "*stricto sensu*" and not "means" or "ends" proportionality) is dead.<sup>55</sup> As Justice Souter so poignantly put it in his dissent in *Andrade*: "If Andrade's sentence is not grossly disproportionate, the principle has no meaning."<sup>56</sup>

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disproportionate to the criminal offence," thus eliminating the adjective "gross." See also EMILIOU, *supra* note 6, at 268 (noting that the same basic assessment applies in Germany: "[G]erman courts require proof of manifest or clear disproportionality before they substitute their own opinion for the opinion of the legislator or administrator on the merits.").

Andrew von Hirsch and Andrew Ashworth, the two most prolific advocates of a defined retributivist system, have recently acknowledged that requiring "strict" "proportionality" might be too difficult. ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (2005). See also RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 30 (1979) ("[T]he argument that desert theorists must show that the proposed punishment is exactly proportionate to the offense . . . is a straw man; perhaps [critics should speak] . . . of 'Roughly Doing Justice Equally.'").

<sup>53</sup> See Ristroph, *supra* note 4, at 311 (arguing that the concept of proportionality "seems to have been eclipsed completely by judicial deference to legislative penology").

<sup>54</sup> A point often unmentioned in discussions of *Ewing* and *Andrade* is that the crimes of which Ewing and Andrade were convicted were "wobblers" which *could* have been treated as a misdemeanor by either the prosecutor or the court. The "double whammy" of first treating the offense as a felony, and *then* treating it as a *third* felony, dramatically enhancing the sentence, raises severe questions of proportionality. The issue had been raised in an earlier petition to the Court where the trial court had treated as a (third) felony defendant's theft of a bottle of pills that the state appellate court had characterized as "a petty theft motivated by homelessness and hunger." *Riggs v. California*, 525 U.S. 1114, 1114 (1999) (denying certiorari). Three justices voiced concern over this process, noting the importance of the issue, but thought it prudent not to grant certiorari until further development of the issue in California. *Id.* at 1115–16. The Court failed to discuss the possible abuse of prosecutorial (or judicial) discretion in either *Ewing* or *Andrade*.

<sup>55</sup> The language is grim indeed. Smit & Ashworth, *supra* note 52, at 545, call these cases the "virtual abolition of the disproportionality principle in the US Constitution." In turn, Van Cleave, *supra* note 28, at 718, concludes that the Court has "pursued a course of virtually gutting the Eighth Amendment of any proportionality principle as to terms of imprisonment." See also Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527 (2008); Y. Lee, *supra* note 34, at 695 ("[P]roportionality has become virtually meaningless as a constitutional principle."); Ristroph, *supra* note 4, at 312–13 ("Again, the reluctance of the *Roper* majority to defer to legislative judgments about how best to serve penological purposes is probably limited to the death penalty context. In noncapital criminal proportionality decisions of recent years, the Court shows a distaste for substituting (or appearing to substitute) judicial assessments of appropriate penal strategy for legislative ones.").

<sup>56</sup> 538 U.S. at 83. Tellingly, the authors do not quote this (normative) phrase from Souter's dissent, while they do quote that section where he scoffed at the (utilitarian) notion that Andrade became more dangerous because he shoplifted a second video tape. (P. 141.) In an earlier article, Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment*:

The critics of *Ewing-Andrade* would have us refer to two separate parts of the earlier *Solem* approach: (1) *stricto sensu* and (2) comparative analysis. We will turn to the latter first, then to Frase and Sullivan's take on retribution per se.

### C. Comparative Analysis

In both the death penalty cases and in punitive damages cases, the Supreme Court has purported to rely heavily on intra- and inter-jurisdictional comparisons. Even before *Exxon*, the Court's third "guidepost" enunciated in *BMW* had endorsed a quasi-comparative analysis for punitive damages, a path that was embraced in *Exxon* to mold a common law (non-constitutional) rule on punitives.

In sentencing cases, however, the Court has now effectively closed that door. In *Harmelin*, the Court retreated somewhat from comparison of sentencing structures of other states, making those tests secondary to a "*strictu sensu*" test, but there was at least the possibility that they would be undertaken in some circumstances.<sup>57</sup> In *Ewing*, however, the Court made clear that the first test (*strictu sensu*) was the doorkeeper to any scrutiny of legislatively allowed sentencing—if the sentence passed that test, it would survive comparative analysis.<sup>58</sup> And, if it did not, it would not survive the second and third prongs (if they were used or necessary). If *Exxon* was the high point of that approach in punitives, and *Kennedy* in the death penalty phase, *Ewing* and *Andrade* were its nadir in constructing what Van Cleave has called a "constitutional sound-wall" between the two areas of law.<sup>59</sup>

Making such intra- and inter-jurisdictional comparisons is admittedly difficult, but it is no less difficult in cases involving punitive damages. As Van Cleave has said:

In capital cases, the Court engages in a comparative analysis without first determining that a sentence of death is "grossly disproportionate" in the abstract. . . . [S]everal commentators have criticized the Court for recognizing a proportionality principle as to all three methods of punishment (punitive damages, terms of imprisonment, and the death

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"Proportionality" Relative to What?, 89 MINN. L. REV. 571, 644 (2005), Frase did cite Souter's language, so its omission here is perplexing. While it is true that the Court's scope of review in *Andrade*, a federal *habeas corpus* case, was limited by the Anti-Terrorist and Effective Death Penalty Act (which restricted the Court and allowed it to consider only whether the California state courts had totally misread clear decisions by the Court), the Court's failure to even scrutinize the actual sentences suggests that the deference (properly) owed to state legislatures has become abdication. Even more disturbing in *Ewing* was the Court's willingness to rely on newspaper articles and other such source material to support the notion that the legislature could reasonably conclude that the three strikes laws were (or might be) effective. See *Ewing*, 538 U.S. at 26.

<sup>57</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 998–1001 (1991) (Kennedy, J., plurality opinion).

<sup>58</sup> See *Ewing*, 538 U.S. at 22–23.

<sup>59</sup> Van Cleave, *supra* note 28, at 709.

penalty), but giving teeth to this limitation only when the defendant might be deprived of life or money . . . .

. . . [I]t is not at all clear why evaluation of a term of imprisonment for excessiveness should not also include such a comparative analysis. Instead, terms of imprisonment are the one form of punishment that, as a practical matter, is not subject to proportionality review.<sup>60</sup>

Frase and Sullivan are not so shaken. They declare that *Ewing* merely “further modified the *Solem-Harmelin* standards.” (P. 139.) But this is a substantial understatement. The critics here are certainly correct that *Ewing* put comparative analysis so far on the back burner that it will never be seen again. Why are Frase and Sullivan so unconcerned? The answer: their scheme requires any court to assess any governmental system—including sentencing—by both “means” and “ends” proportionality. In effect, they seek to bring in through “proportionality” any utilitarian process that was involved in comparative analysis—and to add to that process other, more demanding measures as well. But surely it is dubious that a Court that has banished comparative analysis when it might assist prisoners will turn to another kind of analysis which would provide that same type of assistance.

#### D. “Limiting” vs. “Defined” Retributivism

Sullivan and Frase want courts to analyze all sentences, including noncapital sentences, by all three of the subsets of proportionality: (1) “means” and (2) “ends” proportionality tests; and (3) “retributivist” standards. Again, the first two tests ask whether (1) the sentencing scheme actually achieves its end and, if so, (2) whether the means chosen to achieve that end will achieve that goal without impairing unnecessarily on freedom (in this case the freedom of the convicted criminal from unnecessary punishment). But even if a sentence meets those two tests, it must meet the third test: whether the sentence comports with notions of retribution. And it is here that I find Frase and Sullivan most problematic.

As expounded by its (neo)founder, Immanuel Kant, retributivism was based on “defined” retribution—the declaration that utilitarian goals cannot be included in a retributivist model because the use of such goals treats the offender not as a person but as a thing.<sup>61</sup> It is, in essence, based on a concept of human dignity and personhood. As Justice Scalia put it, “it becomes difficult even to speak intelligently of ‘proportionality,’ once deterrence and rehabilitation are given

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<sup>60</sup> *Id.* at 717–18.

<sup>61</sup> Extraordinarily, Immanuel Kant is not mentioned in the text of the book, but he is quoted before the book’s preface as follows: “The only stable form of government is where the rule of law reigns and does not depend on any person.” This quotation stresses Kant’s goal of limiting government generally (which can easily be embraced by a utilitarian *or* retributivist) but not his normative stance. The failure to even cite in the text, much less discuss Kant’s categorical imperative, is even more puzzling given this “dedication.”

significant weight. Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law.”<sup>62</sup> Clearly what Justice Scalia had in mind was “defining” retributivism, the Kantian notion that utilitarian goals cannot be included in a retributivist model because the use of such goals brings into their model utilitarian concerns which retributivists exorcise.

But Frase and Sullivan have a different (non-Kantian) kind of retributivism in mind, which Frase for many years has advocated: “limiting” retributivism. Limiting retributivism merges normative and utilitarian goals in assessing any kind of punishment (sentencing, punitive damages, fines, forfeitures, etc.). Frase and others in this school have been successful in convincing the American Law Institute<sup>63</sup> and the American Bar Association<sup>64</sup> that this is both a proper interpretation of retributive notions and the only realistically political path to sentencing reform; and it is fair to say that “limiting retributivism” is the dominant force in American criminal scholarship at this time.

As originally proposed by Norval Morris, “limiting retributivism” established a maximum sentence beyond which punishment for a given crime would be disallowed. But Morris was, at best, equivocal about whether there should be a “floor” to a particular sentence range.<sup>65</sup> Morris himself found virtue in parsimony—and mercy<sup>66</sup>—which he thought should not be discarded. For this, he

<sup>62</sup> *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (Scalia, J.). See also *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment) (“Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution.”).

<sup>63</sup> MODEL PENAL CODE § 1.02(2) cmt. b (Tentative Draft No. 1 2007) (discussing the authority of sentencing commissions, and presumptive sentencing guidelines). That draft was adopted by the full ALI. A Discussion Draft of new material was presented at the 2009 and 2010 Annual Meetings. This project is likely to last several more years before completion.

<sup>64</sup> STANDARDS FOR CRIMINAL JUSTICE: SENTENCING § 18-2.4 cmt. (1994).

<sup>65</sup> But see Jeremy Bentham, *Principles of Penal Law*, in THE WORKS OF BENTHAM 365, 399 (John Bowring ed., 1843) (“Punishments may be too small or too great; and there are reasons for not making them too small, as well as for not making them too great.”). See Ristoph, *supra* note 4, at 275–76, (citing Beccaria and Bentham as endorsing a floor); Parr, *supra* note 13, at 62 cites Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 809 (1975), as describing Cesare Beccaria's endorsement of a floor: “[I]f it were possible to prove that the severity of a punishment did not add to its utility, [then] it would be contrary to justice’ to impose such a severe punishment.” But Parr rightly comments:

It is simply a restatement of utilitarian theory to say that sentences should be determined by weighing the benefits of punishment against the costs of punishment, the correct sentence being the one with the greatest net benefit. Because utilitarian calculus does not necessarily produce sentences that satisfy proportionality, this conception of justice has no relationship to proportionality.

Parr, *supra* note 13, at 62.

<sup>66</sup> It is hard to oppose mercy. The difficulty, however, is that if mercy is distributed out on a totally random basis, it becomes whimsical and fortuitous; on the other hand, if it is distributed according to a specific definition or formula, it becomes justice, and not mercy. Dean Morris took the view that the insanity “defense” could and should be abolished, but that persons who were insane would (and possibly should) be given merciful (non-punitive) treatment because of their lowered

was challenged by von Hirsch and Ashworth, who argued vehemently that there must be a floor—a minimum punishment which could not be waived by either the state or the defendant.<sup>67</sup> This is not necessarily inconsistent with Morris' notion of "parsimony"—for a "defined" retributivist, there should not be "unnecessary" pain either—but the floor should be as low as possible consistent with a notion of desert.

Whatever the merits of a floor, things have changed since Morris and von Hirsch first raised the problem. The new Model Penal Code sentencing provisions, which are currently in the process of adoption, as well as the provisions of the American Bar Association, influenced heavily by Frase<sup>68</sup> and others,<sup>69</sup> have embraced sentencing structures which now adopt floors as well as ceilings and construct relatively narrow ranges. Frase, who was one of the first "limiters" to acknowledge a possible floor,<sup>70</sup> embraces it here as well, but does not make clear that this is a significant change from Morris' original version. Nor does Frase acknowledge the "defined" retributivist argument that such a floor is mandated by

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culpability. NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 146–60 (1982). I took exception to the abolitionist view in an earlier writing. See Richard G. Singer, *Abolition of the Insanity Defense: Madness and the Criminal Law*, 4 CARDOZO L. REV. 683 (1983).

<sup>67</sup> VON HIRSCH & ASHWORTH, *supra* note 52. This is sometimes referred to as the "right to be punished." See Herbert Morris, *Persons and Punishment*, in PUNISHMENT 74 (Joel Feinberg & Hyman Gross eds., 1975); Martin R. Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838, 838 (1981). This "right" stems from the idea that if a deserving defendant is not punished, he is being treated as "less than" the free-willed actor he was when he committed the offense and ostensibly still is.

<sup>68</sup> See Richard S. Frase, *Limiting Retributivism*, in THE FUTURE OF IMPRISONMENT 83 (Michael Tonry ed., 2004); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005) [hereinafter *State Sentencing Guidelines*]; Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 607–09 (2005).

<sup>69</sup> Especially Kevin Reitz, the chief architect of the MPC's new sentencing provisions. See, e.g., Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155 (2005); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005); Kevin Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525 (2002).

<sup>70</sup> Frase recognized the need for small images even in a Limiting Retributivism world:

Under this approach, if concepts of desert are to remain as limits on maximum allowable punishment severity, the range of desert, or in Morris's terms, "not undeserved" punishment, must be quite substantial. But at some point, this relaxed version of limiting retributivism breaks down; very broad retributive proportionality limits have little real meaning and practical value. . . . [E]ven within a broad range of retributive and utilitarian proportionality relative to crime severity, another utilitarian proportionality principle may set further limits: Sanctions must not be more severe than necessary to achieve their intended purposes. This principle of "parsimony," or "means proportionality," finds strong support in many areas of U.S., foreign, and international law.

Frase, *State Sentencing Guidelines*, *supra* note 68, at 1213–14 (footnotes omitted).

philosophy and not just practical considerations.<sup>71</sup> Still, as a practical matter, the two schools seem to be closing the gap on this question.

#### E. *Past Crimes*

The movement has gone both ways. For utilitarians, whether incapacitacionists or deterrence theorists, the offender's past crimes are relevant to assessing punishment for the current crime. For some (neo) Kantians, that is anathema—the punishment should be for *this* crime only.<sup>72</sup> But even at the outset of this debate, von Hirsch was uncertain; he agreed with lower sentences for first offenders, initially on the ground that the criminal might not “really” have understood the law's threat.<sup>73</sup> In his most recent work, von Hirsch (and Ashworth) has moved toward allowing (tolerating?) a gradual increase of a sentence (toward the ceiling) depending on the defendant's past history.<sup>74</sup> While they would not accord as much impact as would the “limiters,” they have certainly inched closer to the view that past offenses (or their absence) may properly influence punishment.

#### F. *Individualization and Sentencing*

Limiting retributivists, taking their lead from Morris' cardinal notion of “parsimony,” have long argued that a defendant's social background should be considered in assessing sentencing. Von Hirsch and Ashworth have now endorsed that view as well,<sup>75</sup> although they would not move as broadly as Frase and Sullivan other limiters would. Both schools would now allow the possibility of considering a defendant's old age<sup>76</sup> or mental status as grounds for reducing an otherwise deserved punishment (but they are highly skeptical of the suggestion that socially

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<sup>71</sup> IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100–01 (John Ladd trans., 1965) (“The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it . . .”). See also Parr, *supra* note 13.

<sup>72</sup> Many neo-retributivists—including George Fletcher (GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 6.6.2 (1978)) and I, (RICHARD G. SINGER, JUST DESERTS 67–73 (1979))—held the position that retributivists could not consider past crimes in assessing punishment for the current offense. I adhere to that view, and I assume that Professor Fletcher does also.

<sup>73</sup> ANDREW VON HIRSCH, DOING JUSTICE 84–85 (1976).

<sup>74</sup> VON HIRSCH & ASHWORTH, *supra* note 52, at 148–55.

<sup>75</sup> See *id.* at app. 1; Thorburn & Manson, *supra* note 34, at 291–92.

<sup>76</sup> Frase and Sullivan speak of this at page 145. See also Fred Cohen, *Old Age as a Criminal Defense*, 21 CRIM. L. BULL. 5 (1985). Even as one well into my seventh decade, I find von Hirsch's allowance for aged defendants unpersuasive—can you say “Bernie Madoff”?

deprived defendants should receive a reduced sentence,<sup>77</sup> which limited retributivists might allow, as part of Morris' "parsimony").

Even though von Hirsch and Ashworth provide non-utilitarian explanations for their support for considering social mitigation and past crimes, the upshot is that while there are still wide theoretical differences between the two retributive schools, at least on the issue of what retributivism entails as a practical matter, the differences have diminished. Frase and Sullivan might therefore have embraced a version of defined retributivism, or they might simply have said that the concept is still wrong on jurisprudential grounds. They choose, however, to ultimately reject it *not* because it is not appealing, but because "it is clearly too narrow an approach for federal constitutional purposes; the Supreme Court has held that the Eighth Amendment permits states to pursue a variety of sentencing goals." (P. 161.) The adherence to "limiting retributivism" is not surprising, but the reason is. The sudden capitulation of theory to practice belies much of the rest of the book, which raises theoretical problems with current judicial approaches and then suggests compromises which can be made with them.

Frase and Sullivan's call for adoption of their three-pronged proportionality standard is based substantially on its perceived ability to bring clarity and focus to many fields, but especially the field of noncapital sentencing.<sup>78</sup> As they put it: "[T]he Court's constitutional standards governing lengthy prison sentences are incoherent and are not tied to any clear meaning of proportionality. (P. 130.) [They have been] very poorly defined." (P. 134.) This lack of clarity is so evident that the Court itself has commented on it more than once. In *Andrade*, the Court conceded that its prior opacity in noncapital sentencing cases meant that Andrade could not meet the strict federal habeas corpus test, requiring that he demonstrate that the California courts had ignored a "clear" statement of the law by the Supreme Court because there simply was no such "clear" statement. The Court repeated that view in *Exxon*, the punitive damages case: "[O]ur experience with attempts to produce consistency in the analogous business of criminal sentencing leaves us doubtful that anything but a quantified approach will work. A glance at the experience there will explain our skepticism."<sup>79</sup> The confession is indeed distressing, particularly to academics who believe they can bring rationality and coherence to any arena. But whether "proportionality" will move us in this direction, even their discussion of this arena makes me dubious.

In an earlier article, Frase had, in some detail, explained how the ends- and means-proportionality tests would alter the analysis, if not the result, in the six

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<sup>77</sup> See VON HIRSCH & ASHWORTH, *supra* note 52, at ch. 5. See also Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9, 78 (1985).

<sup>78</sup> As noted, the term "clarity" appears numerous times throughout the book, and it is evident that, beyond the substantive results they seek, the authors hope to bring some consistency to Supreme Court adjudication.

<sup>79</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2628 (2008).

noncapital sentencing cases noted earlier.<sup>80</sup> He was tentative there, exploring the kinds of arguments that the three prongs would generate, but cautious as to the results.<sup>81</sup> In the book, however, Frase and Sullivan are somewhat more conclusive:

[I]n all six of the Court's modern prison-duration cases more precise application of limiting retributive and utilitarian ends- and means-proportionality principles would provide strong arguments in favor of a finding of gross disproportionality at least as a threshold matter, thus permitting application of the more objective and more defendant-friendly second and third *Solem* standards.<sup>82</sup> (P. 146.)

Still, the authors are actually quite modest in terms of the application of the results which their approach might engender as a general matter:

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<sup>80</sup> Frase, *Excessive Prison Sentences, Punishment, and the Eighth Amendment*, *supra* note 68.

<sup>81</sup> His overall conclusion was: "[W]ith a better understanding of proportionality principles, *Solem* would still be decided the same way, but several of the other cases *might* have been decided in favor of the defendant, and should be so decided under state constitutional counterparts of the Eighth Amendment." *Id.* at 634 (emphasis added). Specifically, on *Rummel*: "[E]ven these more generous approaches might not produce a ruling in Rummel's favor . . ." *Id.* at 637; on *Hutto*: "This action suggests that the Legislature would view a forty-year sentence as clearly violating one or more of the proportionality principles . . ." *Id.* at 638; on *Solem*: "[A]ll three proportionality standards . . . establish a strong inference of gross disproportionality . . . requir[ing] a ruling in Helm's favor." *Id.* at 639; on *Harmelin*: "It is plausible to argue that Harmelin's sentence was excessive relative to his culpability . . . sufficient to establish threshold disproportionality, which would then be strongly supported by intra- and inter-jurisdictional analysis." *Id.* at 640-41; on *Ewing*:

Given his extensive prior record, Ewing's case is more comparable to *Rummel* and *Solem* than to *Harmelin*. Ewing's theft of three golf clubs worth about \$400 each was more serious than either Rummel's or Helm's conviction offense, but a strong argument can still be made that a sentence of twenty-five-years-to-life is grossly disproportionate to Ewing's desert.

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... Once analysis proceeds to the second and third *Solem* factors, Ewing's challenge *might* succeed, at least under somewhat more generous standards of review appropriate to state constitutional adjudication."

*Id.* at 642-43 (emphasis added); and on *Andrade*: "Andrade had a strong basis to claim retributive and utilitarian ends disproportionality, based on his trivial conviction offenses . . . Andrade's sentence also violates utilitarian means proportionality." *Id.* at 644.

<sup>82</sup> This is a strong step forward from Frase's first view, but in my view, it is still insufficient. Five of these cases involved recidivist petty offenders (even counting some prior "violent" offenses). These offenders were, in any reasonable sense of the word, "petty." Even on a utilitarian basis, many later (similar) crimes would not have had the same "harm" on their victims as twenty-five (or even ten) years of imprisonment would have on any of these offenders. (I do not here ignore the possibility that crimes are interchangeable and that petty thieves may become personal injurers, but the thrust of "three strikes" statutes is not that.) Nor is it likely that these harsh sentences would deter enough petty offenders to balance the harm to their personhood imposed by these defendants' harsh 10 to 25-year life sentences. Finally, as California and other states are now learning, the financial drain of imprisoning these petty offenders for this length is enormous—many states are now releasing these (or similar) offenders. The bottom line, however, is normative: the sentences in all these cases were simply too long as measured by any kind of "dignity," "personhood," or "decency" standards.



A sentence supported by utilitarian purposes should be held unconstitutional if it grossly violates ends proportionality (because the sentence's burdens greatly exceed the likely crime-control benefits) *or* if it grossly violates means proportionality (because a much less severe sentence would be adequate to achieve the state's asserted crime-control purposes). (P. 144.)

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 . . . [C]ourts . . . should intervene only if the burdens on the defendant are *clearly* excessive relative to the benefits or if equally effective alternative sanctions or other measures are *clearly* less burdensome. These inherent limits on judicial review decisions are reflected (*but to an excessive degree*) in the Supreme Court's requirements of "gross disproportionality" under the Eighth Amendment. (P.165.) (emphasis added).

Frase and Sullivan, however, do not spell out *why* or *how* the current "gross" disproportionality test is different from their "clearly excessive" test. Indeed, they concede that "[a] standard of 'clear' or 'gross' excessiveness . . . is no more<sup>83</sup> subjective than other standards commonly applied by reviewing courts, such as 'reasonableness,' 'compelling state interest,' 'fair notice,' and 'abuse of discretion.'" (P. 166.) If all these standards are "subjective" (as they certainly are), why do we need two (or three) more subjective standards in the guise of "ends" and "means" (or even *strictu sensu*) proportionality?

Of greater concern is the possibility—indeed the likelihood—that even if they adopted the "proportionality" standard, United States courts would defer to legislatures as frequently as they do now. As seen earlier, European courts continue (perhaps properly so) to give legislatures wide room.<sup>84</sup> In a system that

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<sup>83</sup> And I would say no less.

<sup>84</sup> Other courts employing proportionality tests have been deferential to legislatures, even without a federalism concern. Consider the court's decision in Cannabis Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1994, 90 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 145 (F.R.G), *reprinted in* GLOBAL, *supra* note 8, at IV-5 to IV-6:

A [c]ourt can only review the exercise of this discretion to a limited extent, the precise extent depending on the nature of the subject in question, the feasibility of forming a sufficiently clear view, and the nature of the legal interests which are at stake. . . .

....  
 . . . It is essentially for the legislature to determine what sorts of behaviour are to be punishable . . . [A court] cannot consider whether the legislature's decision was the very most suitable . . . [Its] role is merely to check that the substance of the penal provision is compatible with the provisions of the Basic Law . . .

*Accord* CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Village 49(4) IsrSC 221 [1995] (Isr.) ("The Court must determine the constitutionality of the law, not its wisdom. There must be reasonable room to maneuver, enabling the legislature to use its discretion in choosing between (a proper)

(again, quite properly) protects "Our Federalism,"<sup>85</sup> such deference might be expected. (Frase and Sullivan seem to recognize that point when, in discussing state cases on sentencing, they point out that state courts have no "federalist" concerns and are hence freer to strike down sentences, even under state constitutions, than are the federal courts. (P. 153.))

Frase and Sullivan's embrace of "limited retributivism" creates another hurdle for them. Because they allow *some* utilitarianism, even in their assessment of retributivism, they must embrace, at least to some degree, the penological lottery which *Ewing* established: if the sentencing scheme can be explained or defended on *any* utilitarian ground, it must be *prima facie* valid. But since incapacitation, deterrence, and rehabilitation all depend on predictions of the future, it is hard to disprove the legislative hope that future crimes will be diminished, thus making it more difficult to assess the proportionality between the crime and the sentence. Past data will always be suspect, and predictions for the future will always be rosy.<sup>86</sup>

In particular, the proportionality principles which the authors extol might disappear entirely if one utilitarian notion—incapacitation—were allowed to assess sentences. This has already, at least on some occasions, occurred in Europe, the "home" of proportionality, from which the authors take their approach. In some of these countries, there is a "separate" track for "dangerous" offenders.<sup>87</sup> The European Court of Human Rights has held, for example, that a sentence must be proportionate; but if the sentence is preventive, the requirement of proportionality disappears. In one case, for example, the court upheld a sentence of life imprisonment imposed on a seventeen-year-old defendant because the sentence was intended to be preventive; had the court intended the sentence to be punitive, it would have measured the sentence by proportionality standards.<sup>88</sup>

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purpose and means (that infringe to an extent no greater than is required). Every lawmaker has reasonable room to maneuver.").

<sup>85</sup> Apologies to Justice Scalia (and others).

<sup>86</sup> There is, as Scarlett O'Hara hoped, "always tomorrow." *GONE WITH THE WIND* (Selznick International Pictures 1939).

<sup>87</sup> See, e.g., 1 STRAFFELOVEN [STRFL] § 81 (Den.), translated in *THE DANISH CRIMINAL CODE* 50 (Else Giersing & M. Grünhut trans., 1958); CODE PENAL [C PEN.] art. 132–38 (Fr.), translated in *THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE* 61–62 (Gerhard O. W. Mueller ed., Jean F. Moreau, trans., 1960); STRAFGESETZBUCH [STGB] [Penal Code], Nov. 13, 1998, BUNDESGESETZBLATT [BGBl] § 66 (Ger.), translated in *THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE GERMAN PENAL CODE* 32 (Stephen Thaman trans., 2002); Criminal Justice Act, (2003) c. 5, 225, 12(3) HALS. STAT. (4<sup>th</sup> ed.) (Eng.).

<sup>88</sup> In *Weeks v. United Kingdom*, App. No. 9787/82, 10 Eur. H.R. Rep. 293, 310–11 (1987), a seventeen-year-old mentally disturbed (but not insane) defendant used a starter pistol filled with blanks, robbed a store owner of thirty-five pence in an attempt to obtain three pounds which he owed his mother. Rather than sentence him to a long, determinate term for the armed robbery, the trial judge, finding him to be "a very dangerous young man" and in "mercy to the boy," sentenced him instead to an indeterminate life time sentence, declaring that "[i]t may not take long" before his release, and that "[t]he Secretary of State can act if and when he thinks it is safe to act." *Id.* at 296. Early release did not occur. Weeks was released on parole ten years later, but he spent the next

An almost parallel case occurred in Canada. In *R v. Lyons*, the defendant, one month after his sixteenth birthday, committed four offenses: breaking and entering a dwelling-house; using a weapon in committing a sexual assault; unlawful use of a firearm while committing an indictable offense; and theft over \$200.<sup>89</sup> (There are no more details in the opinion about the crime, but the impression is that he sexually assaulted someone at the point of a weapon). Under the relevant statutes, an offender convicted of a "serious personal injury" and found by the trial court to be dangerous could be sentenced to an indeterminate term. Although the trial judge was concerned from the outset about the defendant's age, he ultimately found on the basis of medical and other evidence presented to him that the teenager had a "sociopathic personality," and that it could be said with "a high degree of confidence" that it was "very likely" that the appellant would constitute a danger to the psychological or physical health and lives of others owing to "his in-built, perhaps congenital indifference to the consequences to others, his lack of affect, his lack of feeling for others." The Canadian Supreme Court upheld the sentence as not disproportionate because it was based on dangerousness, not on the underlying crimes.

Could this happen here, even if we adopted proportionality? Smit and Ashworth, citing *Kansas v. Hendricks*,<sup>90</sup> summarize the fear: "[T]he indications are that even the liberal wing of the [United States] Supreme Court would abandon forthwith a search for grossly disproportionate punishment . . . if the judges believed that the offender was highly dangerous."<sup>91</sup>

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decade in a revolving door, committing one minor offense after another, and having his parole revoked, reinstated, etc. While noting that only 17 of 54,580 armed robbers convicted over a period of fifteen years had been given life terms, *id.* at 300, the Court did not invalidate the sentence on proportionality grounds, and only one judge (of seventeen) even broached the issue of whether the life term was disproportionate. *Id.* at 322–23 (De Meyer, J., partly dissenting). The Court did, however, find that the procedures used by the Parole Board violated Article 5(4) of the European Convention on Human Rights. *Id.* at 293. The processes in England both in regard to parole, see John Jackson, *Evidence and Proof in Parole Hearings: Meeting A Triangulation of Interests*, 2007 CRIM. L. REV. 417 (Eng.), and for dealing with mentally disturbed offenders, have been altered since, and *Weeks* is an extreme case; but it does suggest that "disproportionality" may dissipate when incapacitation, and not desert, is the measure of a sentence's fairness. See also *Van Droogenbroeck v. Belgium*, App. No. 7906/77, 4 Eur. H.R. Rep. 443 (1982), for a similar case from Belgium. Both *Weeks* and *Van Droogenbroeck* invalidated the continued detention on procedural, rather than substantive, grounds.

<sup>89</sup> *R. v. Lyons*, [1987] S.C.R. 309, 310 (Can.).

<sup>90</sup> *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (upholding a sexual predator statute).

<sup>91</sup> Smit & Ashworth, *supra* note 52, at 554. It is not absolutely clear that the authors are referring to the United States Supreme Court, since they also mention the Canadian Supreme Court in the same paragraph. But I read them as discussing the U.S. Supreme Court, since the prior discussion had been of that Court's decisions. Even if they were referring to the Canadian experience, their observation tracks closely what happened in the "six cases," five of which involved habitual offenders ("preventive detention" sentences). The processes that various European countries follow for imposing such a sentence are much like those involved in *Hendricks*, with many more procedural protections and with a specific focus (and evidence presented) on dangerousness. The American statutory three-strikes systems "presume" dangerousness (high risk of recidivism) without further

Frase and Sullivan acknowledge this problem, but only in the last paragraph in the chapter:

Other examples of the application of multiple, independent constitutional sentencing proportionality standards appear in foreign cases that involve dangerous offenders. High courts in Canada, England, and South Africa have upheld lengthy indeterminate prison terms imposed on such offenders only where the conviction offense is very serious (retributive and/or ends proportionality) and provided further that there are provisions for periodic review of the offender's dangerousness so that his detention continues no longer than is necessary to protect the public (means proportionality). (P. 168.)

This is too quick. Surely the availability, no matter how limited and proscribed, of a "preventive" track (not unlike the habitual offender statutes in the United States),<sup>92</sup> undercuts the argument that mere adoption of the European proportionality approach to sentencing will be more coherent than the current one in Supreme Court adjudication—particularly considering that the only decision in which the Court struck down any such scheme was *Solem*, which did not provide for any "periodic review" at all.

This, after all, is the heart of the debate between "limited" and "defined" retribution. So long as proportionality endorses *any* notion of utilitarianism, as Frase and Sullivan clearly believe it does and should, and so long as the Court finds *any* penological goal acceptable, there is the possibility that long-term incapacitative sentences will always be upheld, notwithstanding the authors' analysis of the "six cases."

Many years ago, Frank Zimring warned neo-retributivists of the power of the eraser: while we endorsed determinate sentences lying in a very narrow range of sentences because we thought they would be short, he suggested that we were whistling past the cemetery.<sup>93</sup> He was right. Let us hope that Frase and Sullivan are more successful than we were.

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proof of the individual's propensities. The issue then becomes whether the risk that an offender will continue petty crimes makes him sufficiently "dangerous" to warrant indeterminate confinement. Frase, in his *Minnesota Law Review* article, *supra* note 68, seemed to be willing to call such offenders and Rummel, Ewing, and Andrade potentially "dangerous," in part because they had committed one or more "personal" crimes.

<sup>92</sup> The *Lyons* court, like the *Rummel* Court, cited the possibility that Lyons could be released after "periodic" review. *R. v. Lyons* [1987] S.C.R. 309 (Can.).

<sup>93</sup> See Franklin E. Zimring, *Making the Punishment Fit the Crime*, 6 THE HASTINGS CTR. REPORT 13, 17 (1976).

## VII. PRISON CONDITIONS AND BAIL

Frase and Sullivan also discuss the use of the Eighth Amendment in prison condition and bail/fine cases. In the former, they recognize that the Court has developed two sets of standards, one involving “deliberate indifference” and the other requiring the prisoner to show that the corrections officials were “malicious and sadistic.” (Pp. 147–48) (citations omitted). They properly argue that there should be only one standard.<sup>94</sup>

In discussing bail and fines, they critique the Court’s decision in *United States v. Bajakajian*,<sup>95</sup> but do not (in my view) criticize it sufficiently. (Pp. 150–53.) In *Bajakajian*, the Court concluded that the Excessive Fines Clause of the Eighth Amendment was violated when Congress required forfeiture of whatever amount of money a person traveling outside of the United States failed to disclose when leaving these shores.<sup>96</sup> The Court found (not surprisingly, particularly in light of the specific word “excessive”) that the Excessive Fine Clause contained a prohibition of “grossly disproportionaal” penalties.<sup>97</sup> What is stunning, however, is that the opinion was written by Justice Clarence Thomas, who was unable to find a “gross” disproportionality standard in the Cruel and Unusual Punishment Clause.<sup>98</sup> Moreover, Justice Thomas employed intra-jurisdictional comparison, which the *Harmelin* and *Ewing* courts rejected. Finally, the Court’s opinion focused *not* on the harm with which Congress was concerned—drug lords and others sneaking monies out of the country—but on the individual defendant, Bajakajian, who had not been proven to be such a criminal.<sup>99</sup> Mr. Bajakajian, said Thomas, had merely failed to fill in and sign some papers.<sup>100</sup> This contrasted severely with the Court’s opinions in *Ewing* and *Andrade*, both of which focused on the legitimacy of California’s concern about “recidivism,” not about its concern that *those two individual defendants* had committed or might commit further (nondangerous) crimes.

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<sup>94</sup> Frase and Sullivan also argue that “[i]t is not clear why a separate subjective element is required in this context . . . .” (P. 148.) While I agree, at least one possible reason for the two approaches stems from the procedural posture of these cases: in some the remedy sought is an injunction against prison conditions, while in others the prisoner is seeking to hold the correctional authorities tortiously liable in damages. It is not implausible to require actual culpability where there is possible individual liability, but not where the remedy is an injunctive remedy against the institution as such. For a general discussion, see Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory*, 36 FORDHAM URB. L.J. 53 (2009).

<sup>95</sup> *United States v. Bajakajian*, 524 U.S. 321 (1998).

<sup>96</sup> *Id.* at 324.

<sup>97</sup> *Id.* at 334.

<sup>98</sup> *Id.* at 335.

<sup>99</sup> *Id.* at 338.

<sup>100</sup> *Id.* at 337. Because it involved a federal statute, *Bajakajian* did not raise federalism issues, although separation-of-powers concerns were still present.

## VIII. CLARITY AND PRECISION—ARE THEY ATTAINABLE?

The strongest argument Frase and Sullivan make for adopting their “proportionality” analysis is the serendipity of the current smorgasbord created by the Supreme Court in constitutional adjudication not only in sentencing, but also generally: “[M]ore precise and consistent definition and application of proportionality principles will permit U.S. courts to better serve their vital roles as guardians of individual liberties and will make judicial review more rigorous, more transparent, and more disciplined.” (P. 169.) But the authors appear to adopt a hierarchy not very much unlike that of the current constitutional hierarchy they (rightly) criticize:

Each principle can be tailored to fit the particular context. In some situations . . . the high value placed on individual rights at stake justifies a strict version of means proportionality, equal to or approaching a “least restrictive means” requirement. In other contexts, the lesser value of rights . . . calls for a looser version . . . requiring the government to choose another effective means only if it is substantially less burdensome (or the chosen means is grossly more burdensome). . . .

. . . . [T]he German principle of suitability, like the American rational basis test, will invalidate government actions that serve no legitimate public interest. If that test is not met, the challenged measure is invalid with no need to consider more complex proportionality tests. If the suitability test is met . . . then limiting retributive liability and severity principles are applied. . . . Finally, if the suitability test and retributive limits are satisfied, courts should apply some version of the alternative-means and ends-benefits proportionality principles.<sup>101</sup> (Pp. 171–72.)

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<sup>101</sup> Indeed, their hierarchy sounds very much like the current one, which they succinctly summarize as follows at the beginning of the book:

The system of constitutional review in the United States affords the highest degree of protection to fundamental rights that are either enumerated in the Constitution or, while unenumerated, are ‘deeply rooted in the Nation’s history and tradition’ . . . .

Rights that are considered less foundational to ordered liberty are afforded less protection under the rational basis review, and the majority of social, cultural, and economic rights fall under this category. Very limited review, perhaps not substantially exceeding rational basis, is also applied to the liberty interests of convicted offenders . . . . The Court reserves a more rigorous standard of judicial review, ‘strict scrutiny,’ for the protection of a narrow category of fundamental rights . . . . An approach of intermediate scrutiny provides medium-to-high protection in certain contexts . . . . The narrow definition of fundamental rights that are afforded strong judicial protection in American jurisprudence . . . deprive many individual, social, and economic rights of meaningful protection against government intrusion. (Pp. 4–5.)

Others have been highly skeptical whether proportionality brings clarity.<sup>102</sup> Professor Araiza, for example, has focused on the malleability not of the term proportionality itself, but on the malleability of the “ends” and “means” parts of the approach: “[T]hat test is—literally—a proportionality test that requires some ends-means fit, how broadly or how narrowly the Court conceptualizes the proper unit of analysis will matter in every . . . case.”<sup>103</sup>

This problem is exemplified by the Court’s approach in *Harmelin*. While Harmelin himself was only convicted of *possession* of cocaine, Justice Kennedy upheld the statute by graphically discussing the evils of the *distribution and use* of cocaine.<sup>104</sup> Similarly, in *Staples v. United States*, a defendant who owned a fully automatic weapon was charged with non-registration of that weapon.<sup>105</sup> Five justices considered that strict liability should not be imposed because many guns were unregulated and did not put their owners on notice that they might require registration;<sup>106</sup> four justices focused on the *exact kind of weapon* that Mr. Staples possessed, arguing that an owner of a machine gun could not claim ignorance of the law.<sup>107</sup>

In short, the “framing question”—how, under the proposed proportionality test, one characterizes the government’s aim or the individual’s interest—is likely to be just as subjective,<sup>108</sup> and potentially just as “outcome determinative,” as any

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<sup>102</sup> See e.g., David Cole, *The Value of Seeing Things Differently: Boerne v Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 47 (noting that proportionality standards “provide[] little if any principled guidance”); John T. Noonan, Jr., *Religious Liberty at Stake*, 84 VA. L. REV. 459, 470–71 (1998) (criticizing proportionality test as “extraordinary,” and unsupported by precedent). Professor Karlan echoes that dubiety: “[P]roportionality is both an inherently alluring and an inevitably unsatisfactory measure of constitutionality. . . . [T]he problem lies in translating the principle into a standard for judicial oversight. For all the Court’s invocation of objective factors, it turns out that a key aspect of proportionality review remains fundamentally subjective.” Karlan, *supra* note 28, at 882–83.

<sup>103</sup> William D. Araiza, *The Section 5 Power After Tennessee v. Lane*, 32 PEPP. L. REV. 39, 42 (2004).

<sup>104</sup> *Harmelin v. Michigan*, 501 U.S. 957, 1002–03 (1991). Similarly, in the Cannabis case, the German Constitutional Court considered not only the “danger” posed by marijuana consumption, but the “social” “effect”: “[Cannabis] has the effect of introducing young people in particular to drugs. Through it they become accustomed to intoxicating substances.” GLOBAL, *supra* note 8, at IV-6. “[Peter] Hogg, discusses ‘the importance of the way in which the legislative objective is characterized by the court in shaping the entire justification exercise. He points out, at p. 5, that the ‘higher the level of generality at which a legislative objective is expressed, the more obviously desirable the objective will appear to [be]. However, when step 3 is reached—“least drastic means—the high level of generality will become a serious problem for the justification of the law.”’ Frank Iacobucci, *Commentary on Proportionality in Canada*, in GLOBAL, *supra* note 8, at IV-35.

<sup>105</sup> 511 U.S. 600, 602 (1994).

<sup>106</sup> *Id.* at 619–20.

<sup>107</sup> *Id.* at 640.

<sup>108</sup> David Beatty denies that courts applying proportionality analysis are engaged in substantive value choices. He writes: “Making proportionality the critical test . . . separates the powers of the judiciary and elected branches of government in a way that provides a solution to the

of the tests the Court now uses.<sup>109</sup> While Frase and Sullivan—and I—might hope that would not be the case, I am less sanguine than they.

David Beatty has argued that “proportionality” is not merely a useful device, but that it is the *only* standard a civilized nation may employ:

The idea that a constitution could exist without some standard of proportionality is a logical impossibility. It serves as an optimizing principle that makes each constitution the best it can possibly be.

. . . .  
 . . . Only a theory of review that recognizes that proportionality and equality are synonyms, that the former is the fullest and most complete expression of the latter, has the capacity to treat all forms of discrimination as arbitrary and unjust and beyond the lawmaking powers of all states.

Proportionality makes the legal concept of rights the best it can possibly be.<sup>110</sup>

Frase and Sullivan are much more modest. While they seek clarity and consistency, and an overarching jurisprudential theory, they do not claim that proportionality is the Rosetta Stone. Instead, they seek to persuade the American reader that (a) the consistent use of proportionality as a test of every governmental-individual encounter will result not only in more consistent decisions but in more decisions favoring human and civil rights; (b) the doctrine leads at least to greater transparency and consistency in analysis than the current conglomeration of “outcome determinative” standards have generated; and (c) in fact, underlying principles of proportionality analysis, even if not explicitly adopted by American

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paradox that has confounded constitutional democracies for so long. . . . [P]roportionality . . . qualifies both as a ‘neutral principle’ in Herbert Wechsler’s famous turn of phrase and it meets Ronald Dworkin’s tests of ‘fit’ and ‘value’ as well.” BEATTY, *supra* note 1, at 160–61 (footnotes omitted).

<sup>109</sup> See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 981 (1987):

Balancing opinions typically pit individual against governmental interests. This characterization, however, is arbitrary. Interests may be conceived of in both public and private terms. The *individual* interest in communicating one’s ideas to others may also be stated as a *societal* interest in a diverse marketplace of ideas. Time, place, and manner limitations on expressive behavior may be based on a *governmental* interest in public safety or a *private* interest in unencumbered access to public facilities.

Thomas, *supra* note 28, at 128, makes the same argument in the context of remedies and Section 5 cases:

When the “harm” is isolated to include only the school’s affirmative acts of segregation, then the approved remedy has been narrowed. In *Jenkins*, the lower court tried to frame the scope of the harm to include white flight, arguing it was causally linked to the segregation because when segregation was prohibited, white residents fled to the suburbs.

Subjectivity thus drives the framing question . . . .”

<sup>110</sup> BEATTY, *supra* note 1, at 163, 174.



courts, have emerged, at least from time to time, in various guises. They advocate clarity<sup>111</sup> in judicial writings, and urge courts to explain, rather than simply conclude.

Certainly the hope that all constitutional adjudication could—and should—be subjected to the same spectrum on which government interests are weighed against individual rights, rather than the current situation in which some rights are almost conclusorily treated as less important than others, is attractive. But while the authors give us a sharp, intellectually seductive view of that idea, not even all Europeans agree on the contents of the proportionality principle. Emiliou, for example, suggests that “[the] definition [of the EC] is rather narrower than the German definition of proportionality in that it does not seem to include the subprinciple of suitability.”<sup>112</sup> If the Europeans are unsettled yet about the test(s) and its application, is it possible that we might incorporate it whole into our jurisprudence without that division?

## IX. CONCLUSION

*Proportionality Principles in American Law* is a deeply thoughtful, provocative, and challenging work. It covers a marvelous span of history, and of geography, to great avail. Its references to international decisions suggest that, as we have entered the twenty-first century, Justice Kennedy, and not Justice Scalia, is the voice of the future—willing to consider, and indeed learn from, others who have traveled the same path as we.

The breadth of the United States cases examined and deciphered alone is staggering and impressive. Moreover, this work does not merely rehash the earlier

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<sup>111</sup> As noted earlier, the term appears frequently throughout the book. For examples, see pp. 107, 109, 112, 114, 116, 130, 134, and 169. This is not to decry clarity—it is devoutly to be wished. However, sometimes methinks the authors do protest too much.

<sup>112</sup> EMILIOU, *supra* note 6, at 134. However, Emiliou notes that “[m]ore recently . . . the Court seems to have moved towards the German conception of proportionality.” *Id.* See P. VAN DIJK & G.J.H. VAN HOOF, *THE PROPORTIONALITY PRINCIPLE IN THE EUROPEAN COURT OF HUMAN RIGHTS* 80–82 (3d ed. 1998), excerpted in GLOBAL, *supra* note 8, at IV-56 to -57:

The proportionality test has not been applied [by the European Court of Human Rights] in a uniform manner up until now: The Court uses different variants for different contexts. . . . [W]hile the test is usually applied in a strict manner in the context of the ‘necessary in a democratic society’ requirement . . . a much more flexible version is applied for examining restrictions on property rights.

Accord Walter van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* 37 (Evelyn Ellis ed., 1999), reprinted in GLOBAL, *supra* note 8, at IV-57:

The case law of the ECJ acknowledges the existence of the proportionality principle but does not always attach the same meaning to it. Indeed, the Court sometimes distinguishes *three* elements in it (suitability and necessity of the measure under review and absence of disproportionate character), whereas in many other instances it refers only to *two* [human rights] elements, without making it clear which of the three aforementioned elements it refers to.

work of these two authors. There is much new material and much rethinking of their positions in earlier writings. Their hope that American courts might adopt the "single" test of "proportionality" (even with its three prongs) as it has been used in Europe is certainly enticing—if it could only work.<sup>113</sup>

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<sup>113</sup> One final, very personal note. As a "neo"-retributivist, I nettle at the terms "utilitarian proportionality" (p. 157) or "nonretributiv[ist]" proportionality (p. 152); the concept strikes me, as it does Justice Scalia, as an oxymoron. Perhaps it is the use of the term "proportionality" that is problematic. Had Frase and Sullivan merely advocated uniform application of utilitarian "ends" and "means" analysis, without using the term "proportionality," I might sleep better at night. Perhaps I can learn to love this new language. But, perhaps not: I may learn to love the speakers, and even their ideas, but not the words.